A **WANG HAN LIN & ORS v. HSBC BANK MALAYSIA BHD**

COURT OF APPEAL, PUTRAJAYA
NALLINI PATHMANATHAN JCA
ZABARIAH MOHD YUSOF JCA
HASNAH MOHAMMED HASHIM JCA
B [CIVIL APPEAL NO: W-02(IM)(NCVC)-1778-09-2016]
24 JULY 2017

CIVIL PROCEDURE: *Discovery – Documents – Application for discovery of internal investigation report – Whether report prepared for dominant purpose of*
C *litigation – Whether litigation pending or apprehended – Whether report protected by litigation privilege – Whether such privilege subsists under s. 126 of the Evidence Act 1950 – Whether litigation privilege subsists under common law – Whether document ought to be protected from disclosure at discovery stage – Whether it would serve interests of adversarial system for parties to have sight of report – Rules*
D *of Court 2012, O. 24 r. 7*

EVIDENCE: *Documentary evidence – Discovery – Application for discovery of internal investigation report – Whether report prepared for dominant purpose of litigation – Whether litigation pending or apprehended – Whether report protected by litigation privilege – Whether such privilege subsists under s. 126 of the Evidence*
E *Act 1950 – Whether litigation privilege subsists under common law – Whether document ought to be protected from disclosure at discovery stage – Whether it would serve interests of adversarial system for parties to have sight of report – Rules of Court 2012, O. 24 r. 7*

F The appellants/defendants ('defendants') were advocates and solicitors appointed by the respondent/plaintiff ('plaintiff') bank to act as its solicitors in respect of financial documentation for banking facilities granted by the plaintiff to the borrowers. These banking facilities were granted to finance the purchase of two lots of property. The plaintiff's cause of action against the defendants was premised, *inter alia*, on negligence in advising the release
G of the loans to the borrowers. The plaintiff complained that the defendants had negligently advised the plaintiff that the master title on which the properties were situated were unencumbered, when in fact it was. The borrowers subsequently defaulted on the repayment of these facilities and in view of the encumbrances on the master title, the plaintiff could not recover
H the said loans from either the borrowers nor enforce the security for those facilities. The plaintiff was advised by one of its other external solicitors that the subject properties financed by it were involved in fraudulent double selling by the developer. The plaintiff thus set up an investigation to ascertain the involvement of the various parties that had contributed to the losses
I suffered by the plaintiff in this double selling fraud. Subsequently, a report was made available by the Security, Fraud and Risk Department of the

plaintiff. It was the plaintiff's contention that the foregoing events clearly disclosed that litigation was well apprehended or contemplated by the bank against all parties whose acts or omissions or complicity had resulted in the losses to it. The defendants, pursuant to O. 24 r. 7 of the Rules of Court 2012, applied by way of discovery for, *inter alia*, the investigation report that had been prepared by the plaintiff's officers. The High Court refused discovery of the said investigation report, maintaining that the said report was protected by litigation privilege as it was prepared for the dominant purpose of litigation. Hence, the defendants appealed. The defendants contended that (i) litigation privilege did not afford any privilege to the investigation report commissioned by the plaintiff, as such privilege does not subsist under the provisions of s. 126 of the Evidence Act 1950 ('EA'); and (ii) if litigation privilege did subsist, then the investigation report was not caught by it. The plaintiff, however, asserted that the investigation report was an internal confidential document brought into existence for the dominant purpose of determining legal actions to be brought against all parties implicated. As such, it was submitted that litigation privilege applied to protect the report from discovery.

Held (dismissing appeal with costs)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) While ss. 126 to 129 of the EA collectively may not make express reference to litigation privilege, the common law does. And in adversarial litigation which is the basis of litigation practiced in Malaysia, litigation privilege has for some time been relied upon to ensure that the proper purpose of litigation which formed the core of our justice system is properly met, namely that at trial, the truth (as far as is possible) is attained. Most pertinently, the application of litigation privilege in no matter derogates from, or conflicts with the provisions for privilege in ss. 126 to 129 of the EA. In any event, s. 3 of the Civil Law Act 1956 allows for the application of the common law up to 7 April 1956. Litigation privilege has been in existence and applied long before that date. So it would continue to be applicable post 1956 in Malaysia, so long as it was not inconsistent with the EA provisions on privilege. As it was not inconsistent it would, on the reasoning adopted in *Tenaga Malaysia Berhad v. Bukit Lenang Development Sdn Bhd*, continue to apply even after the passing of the EA, as this doctrine pre-dates 1956. (paras 52-59)

(2) The test for determining whether litigation privilege may be successfully established in a given case is two-fold (a) whether litigation was pending or apprehended; and (b) whether litigation was the dominant purpose for which the report was prepared. In undertaking an assessment of whether or not to order the disclosure of a disputed document, the court was

bound to balance these two seemingly competing principles to arrive at a decision that was just in the circumstances of a particular case. This would depend largely on the factual circumstances surrounding the refusal to disclose. If indeed a third party prepared a document at the behest of a solicitor or his client with litigation being reasonably in prospect, and the dominant purpose being for litigation, then litigation privilege may well come into play. (paras 61-64)

(3) Herein, the trial judge could not be said to have erred in principle in arriving at his decision that the document ought to be protected from disclosure at the discovery stage. It was not unreasonable for the trial judge to conclude that the confidential investigation report was prepared by the plaintiff with a reasonable prospect of litigation on their minds. In point of fact, it was to ascertain the identity of the parties who were responsible for the fraudulent double dealing of the subject properties that the investigation and report were commissioned by the legal department. This satisfied the first limb of the two fold test. The dominant purpose for commissioning the report was also for litigation. Thus, both limbs were satisfied. (para 66)

(4) Balanced against this was the need to ensure that relevant evidence was not suppressed. In the instant case, it was unlikely as it was open to the defendants to subpoena the relevant witnesses to testify about the report and its contents. However, it would not serve the interests of the adversarial system for parties, such as the defendants, to have sight of the report, and then plead a defence or prepare documents to meet the case put forward by the plaintiff. That was the nub of litigation privilege and the doctrine ought not to be abrogated for so long as we practice adversarial litigation. (para 67)

Bahasa Malaysia *Headnotes*

Perayu/defendan ('defendan-defendan') adalah peguam bela dan peguam cara yang dilantik oleh responden/plaintif ('plaintif') bank untuk bertindak sebagai peguamnya berhubungan dengan dokumentasi kewangan kemudahan perbankan yang diberikan oleh plaintif kepada peminjam-peminjam. Kemudahan perbankan ini diberikan untuk membiayai pembelian dua lot tanah. Kausa tindakan plaintif terhadap defendan-defendan berdasarkan, antara lain, kecuaian mereka dalam menasihati pelepasan pinjaman kepada peminjam-peminjam. Plaintif mengadu bahawa defendan-defendan telah dengan cuai menasihati plaintif bahawa hak milik induk ke atas kawasan tanah-tanah tiada halangan untuk digunakan, sedangkan ia mempunyai halangan. Peminjam-peminjam kemudiannya gagal membuat pembayaran balik kemudahan tersebut dan memandangkan terdapat halangan ke atas hak milik induk, plaintif tidak dapat mendapatkan semula pinjaman tersebut

daripada peminjam-peminjam dan tidak boleh menguatkuasakan jaminan bagi kemudahan tersebut. Plaintif dinasihati oleh satu peguam luar bahawa tanah-tanah yang dibiayai itu terlibat dalam penipuan jualan dua kali oleh pemaju. Plaintif menubuhkan satu penyiasatan bagi memastikan penglibatan pelbagai pihak yang telah menyumbang pada kerugian yang dialami plaintif dalam penipuan jualan berganda ini. Seterusnya, satu laporan disediakan oleh Jabatan Sekuriti, Penipuan dan Risiko plaintif. Plaintif menghujahkan bahawa peristiwa tersebut jelas menyatakan bahawa litigasi dipertimbangkan oleh bank terhadap semua pihak yang terlibat atas tindakan mereka yang telah menyebabkan kerugian pada bank. Defendan-defendan, menurut A. 24 k. 7 Kaedah-Kaedah Mahkamah 2012, memohon melalui penzahiran dokumen, untuk, antara lain, laporan siasatan yang telah disediakan oleh pegawai-pegawai plaintif. Mahkamah Tinggi menolak penzahiran laporan siasatan tersebut dan mengekalkan bahawa laporan tersebut dilindungi oleh hak istimewa litigasi kerana disediakan dengan tujuan dominan litigasi. Oleh itu, defendan merayu. Defendan menghujahkan bahawa (i) hak istimewa litigasi tidak memberikan hak istimewa kepada laporan siasatan yang ditauliahkan oleh plaintif, kerana hak istimewa itu tidak wujud di bawah peruntukan s. 126 Akta Keterangan 1950 ('AK'); dan (ii) jika hak istimewa litigasi wujud, ia tidak terpakai kepada laporan siasatan ini. Plaintif, walau bagaimanapun, menegaskan bahawa laporan siasatan adalah satu hujahan sulit dalaman yang diwujudkan untuk tujuan dominan menentukan tindakan undang-undang untuk dibawa terhadap semua pihak-pihak terlibat. Dengan itu, dihujahkan bahawa hak istimewa litigasi diguna pakai untuk melindungi laporan daripada penzahiran.

Diputuskan (menolak rayuan dengan kos)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Walaupun ss. 126 hingga 129 AK secara kolektif tidak mungkin merujuk pada hak istimewa litigasi, undang-undang am pula merujuk padanya. Dan dalam litigasi adversarial iaitu asas litigasi yang diamalkan di Malaysia, hak istimewa litigasi telah lama dirujuk bagi memastikan tujuan wajar litigasi yang membentuk teras sistem keadilan dipenuhi, iaitu semasa perbicaraan, kebenaran (sejauh mungkin) dicapai. Paling penting, pemakaian hak istimewa litigasi tidak menjejaskan, atau bertentangan dengan peruntukan untuk hak istimewa dalam ss. 126 hingga 129 AK. Bagaimanapun, s. 3 Akta Undang-Undang Sivil 1956 membenarkan pemakaian undang-undang am sehingga 7 April 1956. Hak istimewa litigasi telah wujud dan diguna pakai sebelum tarikh itu. Dan ia akan terus diguna pakai selepas 1956 di Malaysia, selagi ia tidak menentang peruntukan AK berkenaan hak istimewa. Oleh kerana ia tidak bertentangan, atas alasan yang diguna pakai dalam *Tenaga Malaysia*

Berhad v. Bukit Lenang Development Sdn Bhd, ia akan berterusan untuk diguna pakai walaupun selepas AK dikuatkuasakan, kerana doktrin ini mendahului tahun 1956.

(2) Ujian menentukan sama ada hak istimewa litigasi boleh dibuktikan dalam kes mempunyai dua cabang (a) sama ada litigasi tergantung atau dijangka; dan (b) sama ada litigasi adalah tujuan dominan untuk laporan disediakan. Dalam akujanji satu taksiran sama ada untuk memerintahkan pendedahan satu dokumen yang dipertikaikan, mahkamah terikat untuk mengimbangi kedua-dua prinsip bersaing ini bagi mencapai keputusan yang adil dalam keadaan kes tertentu. Ini akan bergantung pada fakta-fakta keadaan yang merangkumi keengganan untuk mendedahkan. Jika benar pihak ketiga menyediakan dokumen atas perintah seorang peguam atau anak guamnya dengan litigasi sebagai prospek munasabah, dan tujuan dominan untuk litigasi, dengan itu hak istimewa litigasi boleh diguna pakai.

(3) Di sini, hakim bicara tidak boleh dikatakan khilaf apabila mencapai keputusannya bahawa dokumen harus dilindungi daripada pendedahan di peringkat penzahiran. Adalah munasabah untuk hakim bicara memutuskan bahawa laporan siasatan sulit disediakan oleh plaintif dengan prospek munasabah litigasi dalam fikiran mereka. Pada hakikatnya, laporan disediakan oleh jabatan undang-undang untuk memastikan identiti pihak-pihak yang bertanggungjawab untuk urusan penipuan tanah-tanah subjek tersebut. Ini memenuhi bahagian pertama ujian dua peringkat. Tujuan dominan untuk pentauliahan laporan adalah untuk litigasi. Oleh itu, kedua-dua bahagian dipenuhi.

(4) Seimbang terhadap ini adalah keperluan untuk memastikan keterangan relevan tidak ditindas. Dalam kes ini, tidak berkemungkinan itu berlaku kerana ia terbuka kepada defendan-defendan untuk sapena saksi-saksi relevan untuk memberi keterangan mengenai laporan itu dan kandungannya. Walau bagaimanapun, ia tidak akan memanfaatkan sistem adversarial untuk pihak-pihak, seperti defendan-defendan, untuk melihat laporan, dan selepas itu memplidkan pembelaan atau menyediakan dokumen-dokumen bagi memenuhi kes yang dikemukakan plaintif. Itu adalah pokok hak istimewa litigasi dan doktrin tidak patut dibatalkan selagi kita mengamalkan litigasi adversarial.

Case(s) referred to:

Anderson v. Bank of British Columbia (1876) 2 Ch D 644 ***(refd)***
Chadwick v. Bowman (1886) 16 QBD 561 ***(refd)***
Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC ***(refd)***
Dr Pritam Singh v .Yap Hong Choon [2006] 4 CLJ 759 CA ***(refd)***
Harmony Shipping Co SA v. Davis And Others [1979] 3 All ER 177 ***(refd)***

Hickman v. Taylor 329 U.S. 495 (1947) ***(refd)***
Jamil Harun v. Yang Kamsiah Meor Rasdi & Anor [1984] 1 CLJ 215; 1984] 1 CLJ (Rep) 11 PC ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (t/a JB International) [1981] 1 LNS 204 HC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
R v. Derby Magistrates' Court, ex p B [1995] 4 All ER 526 ***(refd)***
Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals [2007] 2 SLR 367 ***(refd)***
Subashini Rajasingam v. Saravanan Thangathoray (No 2) [2007] 3 CLJ 209 CA ***(refd)***
Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd [2016] 10 CLJ 164 CA ***(refd)***
Three Rivers District Council And Others v. Governor and Company of the Bank of England (No 5) [2005] 4 All ER 948 ***(refd)***
Waugh v. British Railways Board [1979] 2 All ER 1169 ***(refd)***
Wee Keng Hong Mark v. ABN Amro Bank NV [1977] 2 SLR 629 ***(refd)***
Wheeler v. Le Marchant (1881) 17 Ch D 675 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3(1)(a)
Evidence Act 1950, ss. 126, 127, 128, 129
Rules of Court 2012, O. 24 r. 7

For the appellant - CK Yeoh & Jeffrey Lee; M/s Ranjit Singh & Yeoh
For the respondent - Benjamin John Dawson, Ooi Ai Yen, Tan Hui Ru; M/s Benjamin Dawson

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCVC-583-11-2015 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

[1] This appeal centers on the legal issue of litigation privilege and its application in this jurisdiction in the context of our adversarial system.

[2] The appellants, who were the defendants in the court below, applied by way of discovery for, *inter alia*, an investigation report dated 7 June 2012, prepared for the respondent, the plaintiff in the court below, by its officers. In other words, the report is an internal investigation report of the respondent. The application for discovery was made pursuant to O. 24 r. 7 of the Rules of Court 2012 and/or the court's inherent jurisdiction.

[3] The High Court refused discovery of the said investigation report maintaining that the said report was protected by litigation privilege as it was prepared for the dominant purpose of litigation.

[4] Before us, learned counsel for the appellants adopted a two-prong approach in relation to the issue of litigation privilege. The first contention was that litigation privilege does not afford any privilege to the investigation report commissioned by the respondent, as such privilege does not subsist under the provisions of s. 126 of the Evidence Act 1950 ('EA'). Secondly, if litigation privilege does subsist, then the investigation report is not caught by it.

[5] Apart from the issue of privilege, in line with the law on discovery, learned counsel for the appellants stressed the significance of the relevance of the investigation report that it sought discovery of. The report was of importance to the defence and it was therefore urged upon us that disclosure ought to be ordered.

[6] Reverting to the issue of privilege, it was the appellants' stance that litigation privilege did not subsist in light of s. 126 of the EA. This submission was premised on a recent decision of this court in *Tenaga Nasional Bhd v. Bukit Lenang Development Sdn Bhd* [2016] 10 CLJ 164; [2016] 5 MLJ 127 ('*Bukit Lenang*').

[7] In that case, this court determined in the course of discussing the issue of privilege, that litigation privilege at common law had been displaced by s. 126 of the EA. Given the existence of a statute codifying the law of evidence, there was no basis on which to rely upon the common law. This was particularly so, it was held, in view of s. 3(1)(a) of the Civil Law Act 1956 ('CLA').

[8] As such, reliance should only be placed on s. 126 of the EA, and that section did not provide for litigation privilege.

[9] Litigation privilege could not therefore be relied upon, to protect from disclosure, any report produced by a third party at the behest of the advocate or the client for the dominant purpose of litigation.

[10] Alternatively, this court in *Bukit Lenang* (above) held that even if litigation privilege did apply, then the factual circumstances relating to the production of the impugned document did not permit the application of litigation privilege. This appeal pertains largely to the first line of reasoning formulated, namely that litigation privilege has been displaced by s. 126 of the EA.

[11] In the instant case, having heard learned counsel, we concurred with the learned High Court Judge that litigation privilege applied to protect the investigation report from disclosure to the appellants at the discovery stage. We therefore upheld the decision of the High Court and dismissed the appeal with costs.

[12] We were asked to furnish the grounds for our judgment, as the issue of whether litigation privilege premised on the common law subsists or is displaced by the EA, is a matter of some significance under the adversarial system of practice adopted in this jurisdiction.

[13] The parties will be referred to as follows:

(i) The appellants, who were the defendants in the court below, will be referred to as the defendants;

(ii) The respondent, who was the plaintiff in the court below, will be referred to as the plaintiff.

Salient Background Facts

[14] We have adopted the facts from the comprehensive submissions of both learned counsel for the appellants and the respondent.

[15] The defendants are advocates and solicitors. They are partners in a firm known as Messrs Wang & SB Wong. The plaintiff which is a bank, appointed the defendants to act as its solicitors in respect of financial documentation for banking facilities granted by the plaintiff to one Chong Kong Ming and Wong Kin Wai ('the borrowers') respectively.

[16] These banking facilities were granted to finance the purchase of two lots of property in Jalan Bukit Templer, Taman Bukit Templer, Rawang Selangor. Both these properties comprise separate lots in a housing project known as "Taman Bukit Templer".

[17] The plaintiff's cause of action against the defendants is premised, *inter alia*, on negligence in advising the release of the loans (or financing facilities) to the borrowers. More particularly, the plaintiff complains that the defendants negligently advised the plaintiff that the master title on which the properties are situated were unencumbered, when in fact it was encumbered.

[18] The defendants issued a confirmation to drawdown advice (in respect of monies to be released to these borrowers) to the plaintiff, as a consequence of which the plaintiff did release the financing facilities.

[19] The borrowers subsequently defaulted on the repayment of these facilities. In view of the encumbrances on the master title, the plaintiff could not recover the said loans from either the borrowers nor enforce the security for those facilities, namely the subject properties.

[20] The plaintiff was advised by another one of its external solicitors that the subject properties financed by it were involved in fraudulent double selling by the developer. The plaintiff received this advice in or around April 2012. The plaintiff was advised that the two properties they had financed above were the subject matter of judicial sales initiated by EONCAP Islamic Bank Berhad. Police reports were duly lodged by the plaintiff.

[21] The plaintiff, *vide* its legal division, set up an investigation which involved several different departments within the bank and its external solicitors. The purpose was to ascertain the involvement of the various parties that had contributed to the losses suffered by the plaintiff in this double selling fraud. In or around 12 June 2012, a report was made available, after investigation, *inter alia*, by the Security, Fraud and Risk Department of the plaintiff. It is this report that comprises the subject matter of dispute in this discovery appeal.

[22] It is the plaintiff's contention that the foregoing events, which are evidenced by an email trail, clearly disclose that litigation was well apprehended or contemplated by the bank against all parties whose acts or omissions or complicity had resulted in the losses to it. In any event, commencement of legal action against the borrowers, developer and the valuers was envisaged as of May 2012. As against the defendants, the legal division of the plaintiff was awaiting further information.

[23] In its affidavit opposing the application for discovery, the plaintiff asserted that the investigation report is an internal confidential document brought into existence for the dominant purpose of determining legal actions to be brought against all parties implicated. As such, it was submitted both here and below that litigation privilege applied to protect the report from discovery.

The Defence

[24] The defendants, in their defence, deny liability in respect of the plea of negligence. They assert instead that the bank was contributorily negligent in failing to peruse or sight the land searches attached to the drawdown advice.

[25] In relation to this application for discovery, they rely on the well-known test in *Yekambaran Marimuthu v. Malayawata Steel Berhad* [1994] 2 CLJ 581 (at 585), namely that:

(i) there exists a document, namely the investigation report;

(ii) the investigation report is relevant to the defence;

(iii) the investigation report is in the possession custody or the power of the plaintiff.

[26] In exercising its discretion whether or not to allow disclosure of the document sought, the court must be of the opinion that the order for discovery is necessary for the fair disposal of the cause or matter.

[27] As to relevance, it is contended for the defendants that the investigation report contains information, which may directly or indirectly enable it to advance its own case or damage the case of the plaintiff or which

may fairly lead to a train of inquiry which may have either of these consequences. (See the Singapore High Court decision of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (t/a JB International)* [1981] 1 LNS 204; [1990] 2 MLJ 282 by Chao Hick Tin JC (as he then was).

[28] In the High Court, the learned judge allowed the discovery of some documents sought, but refused to grant such an order in respect of the investigation report, concurring with learned counsel for the plaintiff that the document was protected by litigation privilege. Reliance was placed on a series of common law decisions including *Waugh v. British Railways Board* [1979] 2 All ER 1169, *Three Rivers District Council And Others v. Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948, and *R v. Derby Magistrates' Court, ex p B* [1995] 4 All ER 526.

[29] These then are the salient facts relating to the application for discovery, as well as the positions adopted by the plaintiff and defendants in relation to the same.

[30] We now move on to set out the reasons for our having dismissed the appeal.

Reasons For The Decision Of This Court

Traditional Position In Law In Relation To Litigation Privilege

[31] Litigation privilege is a cornerstone of the adversarial system of litigation, which is practiced in Malaysia. It takes its roots, as do the provisions of the EA, from the English common law.

[32] Litigation privilege is one of the two recognised categories of legal professional privilege, namely solicitor-client privilege or client advice privilege on the one hand, and litigation privilege on the other.

[33] The rationale for these two categories of privilege is quite different. As early as 1884, Bray in his seminal work on 'discovery', explained the difference:

> Professional Privilege [i.e. privilege affecting communications between lawyer and client] rests on the impossibility of conducting litigation without professional advice, **whereas the ground on which a party is protected from disclosing his evidence [litigation privilege] is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice**.[1] (emphasis added).

[34] Or as more succinctly put by James LJ in *Anderson v. Bank of British Columbia* (1876) 2 Ch D 644 at 656:

> ... as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief.

[35] The issue that arises for consideration is whether the second category of privilege, namely litigation privilege is accorded recognition in ss. 126 - 129 of the EA, and further whether the Malaysian courts are precluded from relying on the common law in relation to litigation privilege. This issue will be considered in the light of the decision in *Bukit Lenang* (above).

[36] [2]In *Bukit Lenang* (above), this court had occasion to deal with the question of whether litigation privilege could be applied and relied upon to exclude the admission of a detailed survey plan. This issue arose in the course of an application to adduce further evidence in the appeal against the judgment of the court below, which found the appellant in the case, Tenaga Nasional Berhad, liable for trespass. In the course of objecting to the application of the respondent to adduce fresh evidence in the appeal, including the detailed survey plan, the appellant objected to production of the latter, maintaining that it was protected by litigation privilege, as it was created for the purposes of litigation.

[37] In their arguments, counsel for the appellants maintained that litigation privilege is a form of legal professional privilege. Further, legal professional privilege is accorded statutory recognition by virtue of ss. 126 and 129 of the EA.

[38] The respondent argued, *inter alia*, that the appellants' reliance on litigation privilege at common law was misconceived by reason of s. 3 of the CLA which had the effect of displacing the common law position by or with s. 126 of the EA. The privilege codified by s. 126 of the EA is not litigation privilege.

[39] The Court of Appeal concurred with the respondent's argument that the codified provisions of the EA displaced the common law position relating to litigation privilege. Accordingly s. 126, which in any event, is not litigation privilege and could not be relied upon to protect disclosure of the detailed survey plan. It was also held that the EA is not to be construed against the background of the common law.

[40] It was further held that the courts must give effect to the relevant provisions of the EA whether or not they differ from the common law rules of evidence as applied by the English courts (see *Public Prosecutor v. Yuvaraj* [1968] 1 LNS 116; [1969] 2 MLJ 89, a decision of the Privy Council). As such where the EA contains a rule of evidence, which is subsequently changed in an English decision, the rule in the EA cannot be construed in the light of the common law decision.

[41] The Court of Appeal went on to hold that even if common law privilege is applicable, no such privilege would accrue over material facts, such as the detailed survey plan which related to the appellants' own infrastructure on and over the respondent's lands. Matters of fact conveyed

in communications subject to litigation privilege are not privileged. Neither was the survey plan procured by the appellants for the purposes of obtaining legal advice.

Effect Of The Decision In *Bukit Lenang*

[42] The net effect of the decision above is, *inter alia*, as follows:

(i) Litigation privilege does not fall within the purview of s. 126 of the EA, which refers to legal professional privilege;

(ii) There is no statutory basis for the invocation of litigation privilege at common law;

(iii) Section 3 of the CLA effectively precluded reliance on the common law given the express codification of legal professional privilege in s. 126 of the EA;

(iv) The earlier Court of Appeal case of *Dr Pritam Singh v .Yap Hong Choon* [2006] 4 CLJ 759; [2007] 1 MLJ 31 (CA) which recognised litigation privilege was departed from, *inter alia* because s. 3 of the CLA was not brought to the attention of the court;

(v) The Federal Court decision in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14 was effectively not applicable because it related to legal professional privilege.

[43] In relation to the primary reasoning in this case, there is an effective excision of litigation privilege on the grounds that it is premised on the English common law, which is inapplicable in our jurisdiction in light of s. 126 of the EA and s. 3 of the CLA. Section 126 of the EA, it was held, applies only to legal professional privilege.

[44] With respect, it is not incorrect to state that s. 126 of the EA does not expressly provide for litigation privilege (as discussed at the outset). However s. 126 of the EA does not simply deal with legal professional privilege as a whole, but essentially with legal advice privilege. The full scope of legal professional privilege is dealt with from ss. 126 to 129 of the EA. Again, with the greatest of respect, the primary bifurcation of legal professional privilege into the two categories of client advice privilege and litigation privilege does not appear to have been argued or presented to this court. As stated earlier, such categorisation was recognised as early on as 1884, when Bray's work on 'discovery' was published. The rationale underlying litigation privilege has also been discussed extensively earlier in the paper on Legal Professional Privilege presented at the International Malaysian Law Conference 2016 under "The Sub-Heads of Legal Professional Privilege". Given such categorisation, legal professional privilege covers both heads of legal advice privilege as well as litigation

privilege. As stated in the passage below taken from the said paper, litigation privilege is an important cornerstone of litigation because it ensures that an adversary is not accorded so much disclosure of evidence that he is able to tailor his case to meet the case brought by the other party:

> While relevant evidence is common property for the purpose of trial (no matter which party controls or possesses it), and should be made available to all concerned in the interest of proper adjudication, the manner in which the advocate and solicitor strategises and prepares his case for trial is personal to him and his client. As has been pointed out in so many cases, the advocate (or unrepresented party) must be able to go about his own work without interference or the worry that everything he does will be open to the opposing party's or public scrutiny. ...[3]

[45] Moving on to the EA, while s. 126 deals primarily with legal advice privilege, s. 129 is broader. To adopt the words of Andrew Phang Boon Leong JA in the case of *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v. Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals* [2007] 2 SLR 367; [2007] SGCA 9 at para. 34:

> It should also be noted that since s. 131 [our section 129] is expressed to operate in the broader context of court proceedings where the client might offer himself as a witness, in which case he may be compelled to disclose any communication the court deems necessary. It also extends the area of legal advice privilege to the domain of litigation privilege ...[4]

[46] Sarkar although taking a different position in maintaining that neither ss. 126 to 129 of the EA do not provide for litigation privilege, still recognises that communications from third parties to a client or his advocate/legal adviser for the purpose of litigation are afforded protection from disclosure. This is how the relevant part of the text from *Sarkar on Evidence* reads:

> Communications From Third Persons to the Client or Legal Adviser for the Purpose of Litigation.
>
> ... There is no special provision in the Act for the protection of similar communications for the purpose of litigation between the client and persons other than legal advisers or between third persons and legal advisers. Such communications are also protected from disclosure and the discretion rests with the court. It has been held that s. 130 does vest the discretion and it is to be exercised according to the practice of the court. And although a document may not be such as passed directly between the legal adviser and the client, yet if it be of such a nature as to make it quite clear that it was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers, then the court will not compel the production of such document [*Vishnu v. New York L I Co* 7 Bom LR 709]. ... Again evidence obtained by the solicitor or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or

threatened, or with a view to the defence or prosecution of such litigation [*Wheeler v. Le Marchant* 17 Ch D 682 - per Jessel MR. In *Anderson v. Bank of Br Columbia*, LR 2 Ch D 644, James LJ said: "You have no right to see your adversary's brief and no right to see the materials for the brief". A

[47] The learned author then goes on to categorise communications from third persons for the purpose of litigation into two distinct heads, namely communications called into existence by the client for the purpose of submission to the legal adviser, either for his advice or for the conduct of litigation and secondly, communications called into existence by the legal adviser. B

[48] Pursuant to such categorisation, he concludes that communications from third parties such as experts that are called into existence by the advocate for the purposes of litigation are privileged. Numerous examples are provided. C

[49] While communications and documents from such experts or third parties, not called into existence by the legal adviser obtained for purposes of litigation are not so protected. Examples include copies of letters written for purposes of litigation, though not called into existence by the solicitor (see *Chadwick v. Bowman* (1886) 16 QBD 561) and a survey report made at the solicitor's request though not for the purpose of litigation was not privileged (see *Wheeler v. Le Marchant* (1881) 17 Ch D 675). These latter two cases were relied on by the court in *Bukit Lenang* (above), in holding that litigation privilege did not subsist in Malaysia. However, these cases in fact comprise examples of instances where litigation privilege did not apply because the documents from third parties were either not called into existence by the legal adviser, or were not procured for the purposes of litigation. They are not authority for the proposition that privilege does not ever apply to third-party communications to a client or his legal adviser. D E F

[50] It is evident therefore that privilege may be and is accorded to communications and documents by third parties to a client or his legal adviser where litigation is threatened or has commenced provided those communications were at the behest of the litigant or his adviser for the dominant purpose of litigation. Even then matters of fact are still required to be disclosed to the court at trial by an expert. (See Denning MR in *Harmony Shipping Co SA v. Davis And Others* [1979] 3 All ER 177). G

[51] While therefore it can be said that s. 126 does not deal with litigation privilege, it is evident that s. 129 expands into the area of litigation privilege. Certainly, there is nothing in the EA that is contrary to the concept or application of litigation privilege. H

[52] In any event as I concluded earlier, while ss. 126 to 129 collectively may not make express reference to litigation privilege, the common law does. And in adversarial litigation which is the basis of litigation practiced I

in Malaysia, litigation privilege has for some time been relied upon to ensure that the proper purpose of litigation which forms the core of our justice system is properly met, namely that at trial, the truth (as far as is possible) is attained.

[53] As stated in *Three Rivers v. Bank of England* (*supra*) by Lord Rodger of Earlsferry at para. 52, quoting in turn from Jackson J in the United States decision of *Hickman v. Taylor* 329 U.S. 495 (1947): "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary".

[54] In any event, it is clear beyond dispute that litigation privilege certainly subsists under the common law. The reasoning adopted in the *Skandinaviska* (above), as stated earlier, proffers a cogent basis for the application of the common law in Malaysia. In *Bukit Lenang* (above), the Court of Appeal held that by virtue of s. 3 of the CLA, litigation privilege which is premised on the common law is effectively displaced by s. 126 of the EA.

[55] The effect of s. 3 of the CLA has been considered in numerous cases. In *Subashini Rajasingam v. Saravanan Thangathoray (No 2)* [2007] 3 CLJ 209; [2007] 4 MLJ 97, the Court of Appeal quoted the judgment of Lord Scarman in *Jamil Harun v. Yang Kamsiah Meor Rasdi & Anor* [1984] 1 CLJ 215; 1984] 1 CLJ (Rep) 11; [1984] 1 MLJ 217:

> ... Put shortly, absent a statutory provision prohibiting the application of developments in English Law after 7 April 1956, a Malaysian court is entitled to apply cases decided in England after that date. Indeed this is what the Federal Court did in *Lori (M) Bhd (Interim Receiver) v. Arab-Malaysian Finance Bhd*.

[56] The last mentioned case recognised the effect of s. 3 of the CLA as effectively providing that the development of the common law after 7 April 1956 (for the States of Malaya) is "entirely in the hands of the courts of this country" (per Edgar Joseph FCJ). That does not prohibit the courts of Malaysia from applying English cases post 7 April 1956. Indeed, the courts have on innumerable occasions applied or adopted positions consonant with the English common law.

[57] It is pertinent that the Federal Court in *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81 further recognised that the trend shown by the courts in common law countries was relevant for the purposes of deciding a case in the Malaysian courts. Indeed, as I have sought to point out in the paper, a consideration of the common law position enables the courts in this country to modulate and formulate the best approach for Malaysia.

[58] Most pertinently, the application of litigation privilege in no manner derogates from, or conflicts with the provisions for privilege in ss. 126 to 129 of the EA.

[59] (In any event s. 3 of the CLA allows for the application of the common law up to 7 April 1956. Litigation privilege has been in existence and applied long before that date. So it would continue to be applicable post-1956 in Malaysia, so long as it was not inconsistent with the EA provisions on privilege. As it is not inconsistent it would, on the reasoning adopted in *Bukit Lenang* (above), continue to apply even after the passing of the EA, as this doctrine pre-dates 1956.)

[60] In summary therefore, with the greatest of respect, I prefer the second line of reasoning adopted by the Court of Appeal in *Bukit Lenang* (above), namely that even if litigation privilege (based on the common law) was applied, the appellant there would not have succeeded in its contention that the survey report warranted protection under s. 126 of the EA because the circumstances necessary to invoke litigation privilege was missing.

[61] In the instant case, it remains only to be considered whether, the confidential report of the plaintiff attracts litigation privilege. The test for determining whether litigation privilege may be successfully established in a given case is two-fold:

(a) Is litigation pending or apprehended? In other words, is litigation reasonably in prospect?

(b) Is litigation the dominant purpose for which the report was prepared?

(See *Skandanaviska* (above); *Waugh v. British Railways Board* [1979] All ER 1169; *Wee Keng Hong Mark v. ABN Amro Bank* NV [1977] 2 SLR 629)

[62] The purpose of the second limb is to ensure that litigation privilege is not excessively extended in relation to third parties. This would have the opposite effect of suppressing relevant evidence and adversely affecting the fair trial of the case. As pointed out by Lord Edmund-Davies in *Waugh v. British Railways Board* (above) at 1182:

> ... And in my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression. For, as it was put in Grant v Downs 135 CLR 674 at 686 majority judgment 'privilege ... detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise.

[63] After exploring the subject further, the conclusion he reached was that the dominant purpose test should be declared as the 'touchstone' to determine whether litigation privilege came into play.

[64] It is therefore important to stress that in undertaking an assessment of whether or not to order the disclosure of a disputed document, the court is bound to balance these two seemingly competing principles to arrive at a decision that is just in the circumstances of a particular case. This will depend largely on the factual circumstances surrounding the refusal to disclose. If indeed a third party prepared a document at the behest of a solicitor or his client with litigation being reasonably in prospect, and the dominant purpose being for litigation, then litigation privilege may well come into play. However, the test has to be applied narrowly, so that the ultimate purpose of litigation, namely to ascertain the truth (or approximating the truth) is upheld.

[65] In the instant case, the learned judge has carefully considered the issue of disclosure against litigation privilege and concluded that the document ought to be protected from disclosure at the discovery stage. At trial, the relevant parties who prepared the report may be subpoenaed to divulge the contents of the report.

[66] We have reviewed the facts of the case and concluded that the learned judge cannot be said to have erred in principle in arriving at his decision. It was not unreasonable of him to conclude that the confidential investigation report was prepared by the plaintiff with a reasonable prospect of litigation on their minds. In point of fact, it was to ascertain the identity of the parties who were responsible for the fraudulent double-dealing of the subject properties that the investigation and report were commissioned by the legal department. This satisfies the first limb of the two-fold test. The dominant purpose for commissioning the report was also for litigation. Both limbs of the test are satisfied.

[67] Balanced against this is the need to ensure that relevant evidence is not suppressed. In the instant case, it is unlikely as it is open to the defendants to subpoena the relevant witnesses to testify about the report and its contents. However, it would not serve the interests of the adversarial system for parties, such as the defendants, to have sight of the report, and then plead a defence or prepare documents to meet the case put forward by the plaintiff. That is the nub of litigation privilege and the doctrine ought not to be abrogated for so long as we practice adversarial litigation.

[68] In all these circumstances, we were neither convinced nor able to conclude that the learned judge erred, *albeit* in his reliance on the doctrine of litigation privilege as a matter of law, or in his application of the doctrine to the instant facts. We were therefore constrained to dismiss the appeal with costs.

Endnotes:

1. See Jonathan Auburn, *Legal Professional Privilege: Law and Theory, Hart Publishing*, 2000 quoted by Nallini Pathmanathan JCA in a paper on Legal Professional Privilege presented at the International Malaysian Law Conference 2016 on 21 September 2016
2. This part of the judgment is also premised on the paper presented above. However a postscript to the paper has been added by the author in view of *Bukit Lenang* (above) and the entire paper is to be published in the July 2017 edition of the *Journal of the Malaysian Judiciary*
3. See *New Twists in Legal Professional Privilege: Communications for the purpose of Litigation and between the Lawyer and Client* 14 SAcLJ 195 by Jeffrey Pinsler (2002)
4. See also Chapter 34 of *The Dispute Resolution Review on Malaysia* by Tiang Joo Su and Yin Faye Lim